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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MONTANO,

Defendant and Appellant.

A153158

(Solano County  
Super. Ct. No. FCR316226)

Following a search of his apartment pursuant to a search warrant, defendant Jose Montano was charged with possession of heroin with a semi-automatic handgun (count 1) and possession of heroin for sale (count 2). After Montano's preliminary hearing and his unsuccessful motions to quash and traverse search warrants that were based on partially sealed affidavits, Montano pleaded no contest to count 1 (Health & Saf. Code, § 11370.1, subd. (a)), and was sentenced to three years of formal probation and 90 days in the county jail. In this appeal, he asks us to "examine the sealed affidavit and the in camera proceedings to determine whether . . . the motion to quash the warrant was properly denied." We have done so, and affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

On July 27, 2015, Solano County Sheriff's Deputy Ryan Wallace executed a search warrant at Montano's apartment in Vacaville.<sup>1</sup> On a coffee table in Montano's living room Wallace found a digital scale with black residue on it and a black tarry liquid

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<sup>1</sup> We draw the facts from the preliminary hearing transcript, which formed the factual basis for Montano's plea of no contest. Deputy Wallace was the only witness.

that Wallace believed was being used as “cut,” that is, a substance added to heroin to make more drugs. On a nightstand in Montano’s bedroom Wallace found a 9-millimeter automatic handgun with a 14-round magazine attached to it. Wallace also found another digital scale, a pay/owe sheet, and 57.53 grams of heroin—all in Montano’s bedroom. Montano waived his *Miranda*<sup>2</sup> rights and admitted to Wallace that he had cocaine and heroin in his apartment, and that he sold cocaine and heroin. He initially admitted that the firearm in the bedroom was his, but then told Wallace that “it actually belonged to a friend and the friend left it with him.”

The evidence seized in this case was the result of a search conducted and information gathered pursuant to three search warrants, whose legality was thoroughly litigated. Two warrants pertained to the installation of a GPS device on Montano’s car. The third warrant authorized a search of Montano’s apartment, car and person. This warrant was supported by an affidavit from Deputy Wallace which included a sealed attachment. The unredacted portion of the attachment stated that Deputy Wallace believed Montano was selling drugs based on his observations of Montano’s driving and primarily information provided by two confidential informants.

On December 10, 2015, Montano filed a “[m]otion to unseal search warrant affidavit” under *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*). The court (Judge E. Bradley Nelson) held an in camera hearing and granted the motion in part, ordering the district attorney to provide a redacted copy of the sealed affidavit to defendant.

On June 8, 2016, Montano subsequently made a motion to quash and traverse the warrants, pursuant to Penal Code section 1538.5,<sup>3</sup> in connection with the preliminary hearing. In that regard, Montano asked the court to examine the sealed affidavit for inconsistencies or insufficiencies regarding probable cause. The motion was denied, with the court stating, “There’s probable cause to believe—to support the issuance of each of the warrants. There’s really no basis to traverse any of them. There’s not a lack of

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>3</sup> All further undesignated statutory references are to the Penal Code.

consistency. There doesn't appear to be any misrepresentations or omissions. There were two confidential informants. Their information corroborated each other and then was corroborated by the affiant's observations. And it's clear they spoke from personal knowledge. They weren't speaking from speculation or about things that they didn't have foundation to talk about." Montano was then held to answer on the charges.

After the information was filed on November 17, 2016 and Montano pleaded not guilty, Montano made an additional motion to unseal the search warrant affidavit and to suppress the evidence under section 1538.5, subd. (i). The court conducted a further in camera hearing under *Hobbs* on August 16, 2017.

On October 19, 2017, the court denied the motion and stated:

"So after conducting that hearing, I didn't find any reason to change my earlier ruling or to provide further disclosures regarding the sealed affidavit. There's still significant danger to the confidential informants, that's plural, safety and security, and there's still some evidence of an ongoing investigation.

"In terms of the motions to quash and traverse, I'm going to deny those. The totality of the circumstances, both sealed and unsealed portion of the affidavit, indicate a fair probability the evidence sought to be obtained would be obtained or would be found pursuant to the warrants. There was corroboration from the police investigation and observations, independently of information provided by the confidential informants, that's plural. At least one of those informants was presumptively reliable. I don't think I can disclose the reason I concluded that because it's part of the redaction.

"And then the general allegations of inconsistencies or misrepresentations really aren't supported by the public sealed portions of the affidavit. In terms of the *Hobbs* hearing, I did two of them. One was last year. . . . The most recent one was August 16th. . . . I reviewed and resealed the sealed affidavit several times . . . ."

### **DISCUSSION**

Montano asks us to review the sealed record and reverse the denial of the motion to traverse and motion to quash if the confidential informants were not reliable under the totality of the circumstances, and the warrant was therefore not supported by probable

cause. The Attorney General does not oppose our independent review of the sealed and unsealed search warrant affidavit and the sealed transcripts.

If a defendant moves to suppress evidence obtained by search warrant where the affidavit is filed in whole or in part under seal, the defendant may request the trial court to conduct an in camera hearing to determine whether there was a valid basis to seal portions of the affidavit (such as to protect an informant's identity under Evidence Code section 1041), and whether, under the "totality of the circumstances" based on the search warrant affidavit and any oral testimony, there was a "fair probability" that contraband or evidence of a crime would be found in the place to be searched under the warrant. (*Hobbs, supra*, 7 Cal.4th at p. 975.)

We have undertaken this independent review and conclude that the trial court's rulings in these regards were correct.

#### **DISPOSITION**

The judgment is affirmed.

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Miller, J.

We concur:

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Kline, P.J.

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Stewart, J.

A153158, *People v. Montano*